

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**Shepherd Machinery Co.  
Employer**

**Cases 31-RC-8155  
31-RC-8156  
31-RC-8157  
31-RC-8158**

**Shepherd Management Services<sup>1/</sup>  
Employer**

**and**

**International Union of Operating  
Engineers, Local 12, AFL-CIO  
Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The International Union of Operating Engineers, Local 12, filed four petitions under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent four separate units of employees of Shepherd Machinery Co (“SMCo”) at five separate locations.<sup>2/</sup> During the Hearing, the Petitioner amended its petition to include the name of Shepherd Management Services, Inc. (“SMS”) as an Employer and to include in the unit the facility maintenance employees who work for SMS out of the Whittier facility. At the conclusion of the Hearing, the Petitioner took the position,

---

<sup>1/</sup> The names of the Employers appear as amended at the Hearing. I will use the term “Employers” to refer jointly to both Shepherd Machinery Co. and Shepherd Management Services.

<sup>2/</sup> The Petitioner sought to represent employees in separate units at the following three locations: 46101 Sierra Hwy in Lancaster (“Lancaster facility”); 8950 Glenoaks Blvd. in Sun Valley (“Sun Valley facility”); and 25961 Wright in Foothill Ranch (“Foothill Ranch facility”). In addition, the Petitioner sought to represent employees in a fourth unit comprised of employees at two locations in Whittier: 10006 Rose Hills Road (“Whittier facility”) and 2425 Kella Avenue (“Kella Ave. facility”).

consistent with the position of the Employers, that the appropriate unit must include the petitioned-for employees at all five of these locations in one combined unit.

Although the Petitioner and the Employers agree that the appropriate unit must include employees of SMC<sub>o</sub> and SMS at these five locations, they disagree with respect to the unit placement of employees employed by another related Employer, Power Systems Associates (“PSA”) and with respect to employees of SMC<sub>o</sub> who work at three landfills. There also is an issue with respect to the unit placement of interns. For the reasons set forth in Section V below, I conclude that the petitioned-for unit, excluding employees of PSA and excluding employees at the three landfills, is an appropriate unit. With respect to the interns, I conclude that they should be included in the unit once they begin their first cycle of actual employment for the Employers and, therefore, they will be eligible to vote if they have begun to work for the Employers within the eligibility period, as defined below.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

**I. HEARING OFFICER RULINGS:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>3/</sup>

---

<sup>3/</sup> Subsequent to the Hearing, the Employers filed a Request for Administrative Notice, asking that I take administrative notice of two public documents: 1) an Order from Region 21 approving the withdrawal of a prior Petition filed in that Region involving Shepherd Machinery Co. and 2) an agreement between the County of Orange and Shepherd Machinery Co. concerning the Frank R. Bowerman landfill. The Petitioner has advised the Region that it does not oppose this request. I grant the Employers' Request for Administrative Notice and I have taken administrative notice of these two documents.

**II. JURISDICTION:** The Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.<sup>4/</sup>

**III. LABOR ORGANIZATION:** The labor organization involved claims to represent certain employees of the Employers.

**IV. QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

**V. APPROPRIATE UNIT:** The following employees of the Employers constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

---

<sup>4/</sup> The Employer, Shepherd Machinery Co., a California limited partnership, is engaged in the sale, rental, marketing, service, repair and maintenance of Caterpillar heavy equipment, engines, electrical power generation equipment, and supply of genuine Caterpillar replacement parts. Shepherd Machinery Co. maintains facilities at: (1) 10006 Rose Hills Road, Whittier California, (2) 2425 Kella Avenue, Whittier, California, (3) 46101 Sierra Highway, Lancaster, California, (4) 8950 Glenoaks Boulevard, Sun Valley, California, (5) 25961 Wright, Foothill Ranch, California, and operations at (1) Olinda-Alpha Landfill located at 1942 North Valencia Avenue, Brea, California, (2) Prima Deschecha Landfill located at 32250 La Pata, San Juan Capistrano, and (3) Frank R. Bowerman Landfill located at 11002 Bee Canyon Access Road, Irvine, California. During the past twelve (12) months, a representative period, Shepherd Machinery Co. purchased and received goods valued in excess of \$50,000, which goods were directly shipped to Shepherd Machinery Co.'s facilities from points located outside the State of California.

The Employer, Shepherd Management Services, a California limited partnership, is engaged in the management of, and provides services to Shepherd Machinery Co. and Power Systems Associates. Shepherd Management Services maintains facilities at: (1) 10006 Rose Hills Road, Whittier, California, and (2) 3500 Shepherd Street, Whittier, California. During the past twelve (12) months, a representative period, Shepherd Management Services purchased and received services valued in excess of \$50,000, which services were directly provided to the Shepherd Management Services' facilities from points located outside the State of California.

Thus, each of the Employers satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81 (1959).

**INCLUDED:** All full-time and regular part-time technicians, lead technicians, apprentice technicians, material handlers, machinists, technician trainees, hosepress operators, auto technicians, counterperson trainees, auto technician trainees, tool room coordinators, hose shop leads, field technicians, welders, shop partspersons, shipping/receiving clerks, master field technicians, core handlers, core center leadpersons, painters, welder trainees, lead maintenance technicians, maintenance technicians, maintenance helpers, counter sales order coordinators, heavy duty (HD) truck drivers, truck drivers, delivery drivers, warehousepersons, warehouse leadpersons, yardpersons, rental technicians, small tool technicians/drivers and interns employed by Shepherd Machinery Co. or Shepherd Management Services at the following locations: 46101 Sierra Hwy in Lancaster; 8950 Glenoaks Blvd. in Sun Valley; 25961 Wright in Foothill Ranch; 10006 Rose Hills Rd. in Whittier; and 2425 Kella Ave. in Whittier.

**EXCLUDED:** Employees of Power Systems Associates, janitors employed by outside contractors, all other employees, confidential employees, office clerical employees, guards and supervisors as defined in the Act.

The parties agree that the appropriate unit should include the above-described employees. However, as noted above, the Employers assert that an appropriate unit must also include employees of PSA, who work at a location at 3500 Shepherd Street in Whittier and at the Lancaster facility, and must include employees of SMC Co who work at three landfills.

In analyzing the issues in this case, I will first provide a brief overview of the Employers' operations. I will then specifically discuss the unit placement of the PSA employees, the landfill employees, and the student interns.

#### **A. AN OVERVIEW OF THE EMPLOYERS' OPERATIONS**

The three entities at issue, SMC Co, SMS, and PSA are all owned, at least in part, by members of the same family. SMC Co and PSA are both dealerships for Caterpillar products. They sell, rent, service and repair Caterpillar equipment. SMC Co

technicians generally work on heavy construction equipment and PSA technicians generally work on truck engines and generators. SMS provides management to and services for SMCo and PSA, including the following services: human resources; accounting; purchasing; data processing; marketing/promotions; and legal. SMS also provides facility maintenance services to SMCo and PSA. There are nine locations at issue: the five petitioned-for locations, the three landfills, and a facility in Whittier at which PSA employees are employed.

The following is a brief description of the nine locations at issue and the identity of the employer(s) at each location:

(a) Whittier Facility at 10006 Rose Hills Rd, Whittier

This is the main SMCo facility. The employees at this location are employed by either SMCo or SMS. In particular, the lead maintenance technicians, maintenance technicians, maintenance helpers and some of the technicians are employed by SMS.<sup>5/</sup> The remaining employees are employed by SMCo.<sup>6/</sup> SMCo has six shop operations<sup>7/</sup> and a field service operation at this Whittier Facility.<sup>8/</sup>

(b) 3500 Shepherd St facility at 3500 Shepherd St., Whittier

All of the 56 employees at this location are employed by PSA.

(c) Lancaster facility at 46101 Sierra Hwy, Lancaster

Both PSA and SMCo operate out of this facility. SMCo has a machine repair, a rental and a field service operation at the Lancaster facility. Both SMCo and

---

<sup>5/</sup> There are 8 SMS employees in the petitioned-for unit at the Whittier facility.

<sup>6/</sup> There are 150 SMCo employees in the petitioned-for unit at the Whittier facility.

<sup>7/</sup> There is an engine shop, a transmission shop, a heavy equipment repair shop, a general construction equipment shop, a welding shop and an undercarriage shop.

<sup>8/</sup> The field service employees work on heavy construction equipment that is at the customers' locations.

PSA operate a parts department at this facility. PSA also has a truck service and a field service operation at this location. There are 11 PSA employees<sup>9/</sup> and there are 22 SMC Co employees<sup>10/</sup> at this facility.

(d)-(f) Kella facility at 2425 Kella Ave., Whittier; Sun Valley facility at 8950 Glenoaks Blvd., Sun Valley; and Foothill Ranch facility at 25961 Wright, Foothill Ranch.

All of the employees at these three locations are employed by SMC Co.<sup>11/</sup> There only is a rental operation at the Kella facility. There is a field service operation and a rental operation at the Foothill Ranch and Sun Valley facilities.

(g)-(i) Olinda Alpha Landfill in Brea; Prima Deschecha Landfill in San Juan Capistrano; and Frank R. Bowerman Landfill in Irvine.

All of the employees at these three landfill locations are employed by SMC Co.

## **B. UNIT PLACEMENT OF THE PSA EMLOYEES**

The Board recognizes that there often is more than one way in which employees may appropriately be grouped. The Board does not require a petitioner to seek any particular appropriate unit. Rather, the Board only considers whether the unit requested is an appropriate unit, even if it may not be the optimum or most appropriate unit for collective bargaining. *Overnite Transportation*, 322 NLRB 723 (1996). In determining an appropriate unit in a representation case, the Board first considers the unit

---

<sup>9/</sup> The PSA employees are classified as lead truck technicians, truck technicians and counter sales order coordinators.

<sup>10/</sup> The SMC Co employees at this facility are classified as counter sales coordinators, delivery drivers, field technicians, heavy duty (HD) truck drivers, lead technicians, material handlers, technicians, technician trainees, truck drivers and warehousepersons.

<sup>11/</sup> There are 9 employees at the Kella facility, 13 employees at the Sun Valley facility, and 11 employees at the Foothill Ranch facility.

requested by the union and determines whether that unit is appropriate. It is only when the petitioned-for unit is not appropriate that the Board considers alternative units proposed by the parties. *P.J. Dick*, 290 NLRB 150, 151 (1988). Thus, it is not my role to determine whether the unit requested by the Petitioner or the broader unit proposed by the Employers would be the most appropriate unit. Rather, I must determine whether or not the unit requested by the Petitioner is an appropriate unit. And, only if I were to determine that this unit is not appropriate, would I consider whether the unit proposed by the Employers is appropriate.

The Employers contends that PSA, SMC Co and SMS are a single integrated enterprise and that all three entities constitute a single employer. Since a finding that two or more entities constitute a single-employer does not determine the appropriate unit, I do not find it necessary to determine whether or not PSA, SMC Co and SMS are a single employer. *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977). A determination of single-employer status focuses on ownership, structure and integrated control of separate entities, whereas a determination concerning the appropriateness of a unit focuses on the community of interest amongst the employees. *Id* at 77.<sup>12/</sup>

In determining whether the unit requested by the Petitioner in this case is appropriate, the following factors relevant to the employees' community of interest must be evaluated: the extent of centralization of management, supervision and human resources functions and the similarities in the employees' terms and conditions of employment; the differences in the types of work functions and the skills of employees; the extent of functional integration of the operations; the extent of contact and inter-

---

<sup>12/</sup> See also, *Edenwald Construction Co*, 294 NLRB 297 (1989) (in which the Board found that Edenwald, a general contractor involved with heavy construction equipment, and Belt, an entity established to repair and maintain Edenwald's equipment, were an integrated business enterprise and constituted a single employer, but that nevertheless the Belt employees enjoyed a separate community of interest and were not part of the Edenwald bargaining unit) and *Lawson Mardon*, 332 NLRB No. 122 (November 16, 2000) (in which the Board found that based on a traditional community-of-interest analysis, even though Pharma Center Shelby and Lawson Mardon constitute a single employer, there was insufficient evidence to compel the inclusion of Pharma Center Shelby employees in the Lawson Mardon unit).

change between employees; and the bargaining history. *Lawson Mardon U.S.A.*, 332 NLRB No. 122 (November 16, 2000); *Edenwald Construction Co.*, 294 NLRB 297 (1989); *Peter Kiewit Sons 'Co.*, supra at 77.

**(1). THE EXTENT OF CENTRALIZATION OF MANAGEMENT, SUPERVISION AND HUMAN RESOURCES FUNCTIONS AND THE SIMILARITIES IN EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT**

SMCo and PSA have separate organizational and management structures. Moreover, the PSA and SMCo employees are separately supervised. SMCo has general managers for its Service Department, its Rental Services Department and its Parts Department. In addition, there are SMCo managers and supervisors at each of the SMCo facilities. There is separate SMCo and PSA management and supervision even at the shared Lancaster facility. At the Lancaster facility, SMCo has a Branch Operations Manager, a SMCo Rental Services Branch Manager, and various SMCo supervisors who supervise the SMCo employees at that location. PSA has its own managers and supervisors who are responsible for the PSA employees at the Lancaster facility. All SMCo employees are supervised by SMCo supervisors and managers and, likewise, all PSA employees are supervised by PSA supervisors and managers.

SMS provides human resources services for SMCo, SMS and PSA with respect to employees at all nine locations. Therefore, certain labor relations functions are centralized. Personnel policies are uniform at all locations and, although the picture and the name on the cover are different, the same employee handbook is used for SMS, PSA and SMCo employees. SMS also provides common supervisory manuals for supervisors of SMCo, SMS and PSA. Personnel files for SMCo, PSA and SMS employees are maintained by SMS at the Whittier facility. The SMS human resources department recruits employees for all positions and posts announcements of all job openings at all locations, including the landfill locations. When employees transfer between locations, including the landfills, or transfer between positions at PSA and



SMCo, the employees maintain their original date of service. Dates of service are significant with respect to leaves of absences and vesting in the 401(k) and retirement plans. SMS provides training for employees of all three entities and employees from different locations attend certain training sessions together, including the new employee orientation and training relating to harassment, keeping customers first, and safety. Employees of all three entities attend the same annual service awards presentation and there is a quarterly newsletter that is distributed to all employees. Employees at all locations are eligible for the same benefits, including health insurance, retirement and 401(k) plans.

Notwithstanding the centralization of certain labor relations functions, there is significant separate control over day-to-day labor matters. With respect to hiring, it is a PSA supervisor and/or department manager who interviews applicants for PSA positions and decides who should be hired, subject to a background check conducted by the SMS human resources department. Similarly, it is a SMCo supervisor and/or department manager who interviews applicants for SMCo positions and decides who should be hired, subject to the same background check. The SMCo managers and/or supervisors make determinations with respect to the termination of SMCo employees and likewise PSA managers and supervisors make the determinations with respect to the termination of PSA employees. All terminations, as well as most suspensions without pay, must be approved by the human resources department. In practice, however, the human resources department approves the majority all of recommendations concerning terminations. In fact, the record contains only one specific example of a recommendation for termination that was not approved.

With respect to wages, the SMCo managers and supervisors determine the wages for SMCo employees and PSA managers and/or supervisors determine the wages for PSA employees. The record does not reveal how the wage rates of SMCo employees compare to the wage rates of PSA employees. There are at least two incentive programs that are unique to either SMCo or PSA. The SMCo counter sales employees, including

those at Lancaster, are eligible for a counter sales incentive program. There is no evidence that PSA counter sales employees participate in the same or any similar sales incentive program. The senior PSA truck shop technicians at the 3500 Shepherd Street facility are eligible for a commission rate. They earn this extra commission when they complete their work in less than the time allotted in a flat rate book. SMC Co technicians are not eligible to participate in this program. The PSA employees are evaluated by PSA supervisors and managers, who determine which employees will receive merit wage increases. Similarly, the SMC Co employees are evaluated by SMC Co supervisors and managers, who determine which of the SMC Co employees will receive merit wage increases.

Notwithstanding the centralization of certain labor relations functions, there is significant separate control of the PSA and SMC Co operations, including the hiring, terminating, disciplining, evaluating and rewarding of employees.

## **(2) DIFFERENCES IN THE TYPES OF WORK AND THE SKILLS OF EMPLOYEES**

There are similarities between the duties of some of the SMC Co employees and some of the PSA employees, such as the counter sales employees and the drivers. However, the SMC Co technicians primarily work with heavy construction equipment, such as tractors, and the PSA technicians work on truck engines and generators. The knowledge and skills required to work on heavy construction equipment is different than the knowledge and skills required to work on truck engines and generators.

## **(3) FUNCTIONAL INTEGRATION**

There is some, albeit limited, evidence of integration between the work of PSA and SMC Co employees. All stock orders of parts are delivered from Caterpillar to the SMC Co Whittier location, from which they are distributed to PSA facilities and the other SMC Co facilities. Each night, a SMC Co truck driver drives from the Lancaster facility to Whittier, where he picks up parts for both PSA and SMC Co. And, each day, a PSA driver

from the 3500 Shepherd Street facility transports parts for both SMCo and PSA from Whittier to Lancaster. SMCo rental operations at the Sun Valley, Foothill and Lancaster facilities rent generators that are owned by PSA.

On occasion, a particular piece of equipment or component may be worked on both by PSA employees and by SMCo employees. For example, engines being worked on by PSA employees sometimes are brought to the SMCo Whittier facility for a dynamometer test.<sup>13/</sup> SMCo bills PSA for this work.<sup>14/</sup> Several times a month, a SMCo machinist makes modifications on PSA parts so that they can be reconditioned. There also are occasions when a single piece of equipment has a component, such as an engine, that is repaired by SMCo and also has a component, such as a generator, that is repaired by PSA. Or, there may be circumstances where a PSA employee works on an engine that has components that are brought to a SMCo location to be worked upon. However, this is not a frequent occurrence. For example, less than once every three months, PSA employees might disassemble a large bore engine, which is brought to a SMCo location, where a SMCo employee would rebuild the cylinder heads or work on other component parts. There is no evidence of significant contact between PSA and SMCo employees in connection with these occurrences. A SMCo technician testified that when SMCo technicians perform work on components for PSA, to the SMCo technician, the work is the same as it would be if the technician were performing the work for any other customer.

The Employer argues that the fact both PSA and SMCo use the same Caterpillar Dealer Business System (DBS) to process part orders and maintain inventory

---

<sup>13/</sup> The SMCo General Service Manager estimated that this might happen between one and three times a month. The Employers introduced an exhibit that reveals only five specific instances where a PSA engine was brought to the SMCo facility for a dynamometer test between February 2000 and August 2002.

<sup>14/</sup> Apparently, SMCo bills PSA at a rate that is lower than the rate charged to other customers.

evidences an integration of their operations.<sup>15/</sup> However, since other Caterpillar dealers also use this Caterpillar computer network, I do not find this fact to be significant.

**(4) THE EXTENT OF CONTACT AND INTERCHANGE BETWEEN EMPLOYEES**

The PSA employees work at the 3500 Shepherd Street facility and at the Lancaster facility. The 3500 Shepherd Street facility is located quite close to the SMC Co Whittier facility on Rose Hills. There are no SMC Co employees at the 3500 Shepherd Street facility. However, both SMC Co and PSA employees work at the same facility in Lancaster.

The Employer presented into evidence a document that describes 14 instances, during the time period 2/17/00 through 8/8/02, during which PSA and SMC Co employees purportedly worked with or assisted each other. The document reveals that 5 of the instances involve a dynamometer test, which is discussed above. Generally, the other instances involve situations such as a PSA employee providing a SMC Co machinist with information about work the machinist will be performing, a PSA welder fabricating a tube to be used by the SMC Co employee during a test, or SMC Co and PSA employees discussing a repair problem. The Employer also introduced service reports showing instances where PSA and SMC Co employees have worked on different components of the same piece of equipment. Contrary to the Employer's assertion, I do not find that this evidence of contact over a 2½ year period of time establishes that the SMC Co and PSA employees "work together on a regular basis." Nor does it evidence significant contact between employees.

---

<sup>15/</sup> When a SMC Co or PSA employee tries to locate a part through the DBS system, the computer identifies various dealers who have the parts available. Thus, although the system might show that parts are available at other SMC Co or PSA facilities, it also shows parts available at other dealers.

The PSA employees at the 3500 Shepherd Street facility have virtually no interchange and very little contact with unit employees.<sup>16/</sup> At the Lancaster facility, both PSA and SMC Co employees work under the same roof. Although the Lancaster shop employees for both entities work in the same facility, with rare exception, the PSA employees work in one side of the building and the SMC Co employees work on the other side of the building.<sup>17/</sup> There is no dividing wall between the PSA and SMC Co shop areas at the Lancaster facility. But, the areas are separated by a toolcage, hand tables, and work benches. The PSA and SMC Co employees at the Lancaster facility do share the use of certain equipment, such as oil tanks, overhead cranes, large jacks, steam cleaners and shop air compressors and they use the same truck loading dock. However, the record does not establish any significant interactions between the PSA and SMC Co employees in connection with the fact they may all use these particular pieces of equipment.

There is some inevitable contact between the PSA and SMC Co employees at the Lancaster facility, especially in the parts department and the warehouse. There is a parts department for both PSA and SMC Co at the Lancaster facility. There is one PSA and one SMC Co employee that work at the counter selling parts to customers and there is one PSA and one SMC Co employee that work at the “back counter” obtaining parts needed by PSA and SMC Co employees for work they are performing.<sup>18/</sup> The PSA and SMC Co counter employees cover for each other when one or the other is on break or otherwise not

---

<sup>16/</sup> There may be some limited contact between PSA and SMC Co employees in Whittier at joint orientation and training sessions and at joint barbeques. Presumably, the PSA employees at the 3500 Shepherd Street facility might have some interactions with unit SMS maintenance employees; however, there is no evidence concerning the amount or nature of any such interactions.

<sup>17/</sup> On about one or two occasions a year, a PSA employee will bring a truck around to the SMC Co side to work when they are out of space on the PSA side.

<sup>18/</sup> Although the SMC Co and PSA parts employees work in the same parts area at the Lancaster facility, as noted above, they are separately supervised.

available. There is one warehouse at the Lancaster facility for both PSA and SMCo, with separate areas within the warehouse for PSA items and SMCo items.

The PSA and SMCo employees at Lancaster share a common lunchroom<sup>19/</sup>, locker room and restrooms. There is a potential for social interactions at barbeques held at the Lancaster facility for both PSA and SMCo employees.<sup>20/</sup> Not all company-sponsored social events are for employees of both entities. PSA holds an employee social event at the Queen Mary, to which SMCo employees are not invited.

With respect to permanent transfers, during the period from March 2000 to August 2002, there were only seven instances of permanent transfers of employees between SMCo and PSA.<sup>21/</sup> One of these instances involved an employee who transferred from PSA to SMCo to participate in the intern program that is discussed below in Section D.

There is virtually no evidence of temporary interchange of SMCo and PSA employees, even at the shared Lancaster facility. When work is slow at the SMCo Lancaster operation, SMCo may ask for volunteers to leave early. When work is slow at the PSA Lancaster operation, employees may be given the option of going home or working at the PSA facility at 3500 Shepherd in Whittier, if work is available there. An employee testified that when he asked a SMCo manager if perhaps the PSA and SMCo employees could assist each other when work was slow, he was told that it would be too

---

<sup>19/</sup> Although the PSA and SMCo employees can use the same lunchroom, it does not appear that many employees from the two entities actually eat in there at the same time. One SMCo employee testified that usually only about 3 to 4 SMCo employees and 2 to 3 PSA employees use the lunchroom and that the PSA employees tend to eat lunch a little later than the SMCo employees.

<sup>20/</sup> There also are barbeques held during the warm months in Whittier, to which employees of SMCo, SMS and PSA are invited.

<sup>21/</sup> The Employers' Brief cites 9 permanent transfers, but the Employers apparently included 2 transfers of individuals who would not be in the bargaining unit (assistant customer service coordinator and credit administrator). Only 2 of the 7 transfers occurred within the 12-month period of time prior to the hearing. During the period of over 11 years from March 1991 to August 2002, there were only a total of 9 permanent transfers of employees between PSA and SMCo.

difficult since they are separate companies and the mechanics don't know each others' work. There are only two specific instances of temporary transfers of employees between SMC Co and PSA. In one of these instances, which occurred prior to April 2001, a SMC Co welder was temporarily assigned to work for PSA for four to six weeks. As the SMC Co General Service Manager admitted, this was a unique circumstance. The other instance occurred in October/November 2001, when an SMC Co technician worked for about four weeks assisting in the PSA field service department.

The Employer presented evidence that PSA employees and SMC Co employees may assist each other during the annual inventory project. I note, however, that there is an insignificant amount of time involved in this type of work. The inventory, which occurs only once a year, lasts from about 4 to 8 hours, depending on the facility. Moreover, the only specific evidence in the record of inter-employer inventory assistance is an example of a PSA counter person helping at a SMC Co inventory about two years ago. I also note that a SMC Co employee at the Whittier facility, who has been employed by SMC Co for 35 years, testified that the once a year inventory at that main Whittier facility only takes about one day and that he has never seen a PSA employee assist at their inventory and he never has assisted at the PSA inventory.

Although there may be some interactions between the PSA and SMC Co employees at the Lancaster facility, particularly in the parts department, the record fails to establish frequent contact between PSA, SMS and SMC Co employees. Moreover, there is an insignificant amount of both permanent and temporary interchange between the SMC Co and PSA employees.

#### **(5) BARGAINING HISTORY**

There is no relevant bargaining history.

In light of the foregoing, I conclude that the employees in the petitioned-for unit share a community of interest that is distinct from the community of interest shared

by the PSA employees. In this regard, I particularly note the lack of significant interchange between the PSA employees and the unit employees.<sup>22/</sup> I also particularly note that there is no overlap in supervision of the PSA and unit employees. To the contrary, the SMC<sub>o</sub> employees work under the direct and indirect supervision of SMC<sub>o</sub> supervisors and managers who make determinations affecting their day-to-day work and their job status. In addition, there is a lack of significant contact between the PSA and unit employees, there is a distinction between the central work performed by the PSA and unit employees, and the employees' skills are distinguishable. Moreover, I note the absence of a bargaining history and the absence of a labor organization seeking a broader unit. I do not find that the centralization of certain labor relations functions, the uniform employee benefits and personnel policies, the geographic proximity of PSA employees to unit employees, or the limited amount of functional integration render the petitioned-for unit inappropriate without the inclusion of the PSA employees. Therefore, I reject the Employer's position that the appropriate unit must include the PSA employees. See, *Executive Resources Associates*, 301 NLRB 400, 402 (1991); *Lawson Mardon U.S.A.*, *supra*.

### **C. UNIT PLACEMENT OF SMC<sub>o</sub> EMPLOYEES AT THE THREE LANDFILLS**

SMC<sub>o</sub> has contracts with the County of Orange, pursuant to which it provides services at three landfills. There are SMC<sub>o</sub> employees who work at the three landfills performing repair and maintenance work on heavy equipment used at the landfills. These employees are delivery drivers, lead technicians, oil trainees, technicians and technician trainees.

---

<sup>22/</sup> See *Executive Resources Associates*, 301 NLRB 400, 401 at fn.10, (1991), in which the Board cited with approval the statement by the 9<sup>th</sup> Circuit Court of Appeals in *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9<sup>th</sup> Cir. 1981), that "the frequency of employee interchange is a critical factor in determining whether employees who work in different [groups] share a 'community of interest' sufficient to justify their inclusion in a single bargaining unit."



The SMS human resources department performs human resources functions, such as running background checks, providing training and approving terminations, with respect to employees at the landfills, as well as employees at the other SMCo, SMS, and PSA facilities. In addition, the same company policies apply to the SMCo employees at the landfills as apply to the SMCo employees at other locations. However, the SMCo employees are separately supervised. There is one supervisor for all of the SMCo employees at the three landfills. He reports to the SMCo General Service Manager. The supervisor of the SMCo landfill employees does not supervise any other unit employees.

The employees at the landfills work on equipment that is similar to the equipment that other SMCo employees work on. Therefore, the skills of the SMCo employees at the landfills are similar to the skills of other unit SMCo employees. Notwithstanding the similarity in their skills, there is virtually no interchange between landfill and other SMCo employees. Although employees regularly float between the three different landfills<sup>23/</sup>, there only is about one instance each quarter when an employee at a landfill works at a SMCo facility other than a landfill.<sup>24/</sup>

The SMCo employees at the landfills work hours that overlap with the hours of their particular landfill and they are required to wear special uniforms for safety reasons<sup>25/</sup>. The record does not reveal how the wages paid to the SMCo employees at the landfill compares to the wages of other SMCo employees. However, in November 2001, the State of California Department of Industrial Relations determined that the SMCo employees working at these three landfills are covered by prevailing wage laws

---

<sup>23/</sup> There are about two or three instances of employees floating between the landfills each week.

<sup>24/</sup> There also is evidence in the record that a SMCo welder from the Whittier facility once worked at a landfill for two weeks.

<sup>25/</sup> I am aware that not all of the unit employees work the same hours or wear the same uniform and, therefore, I do not rely on these factors in concluding that the landfill employees may be excluded from the unit.

of the State of California. In July 2002, the Department of Industrial Relations rejected an administrative appeal by SMCo of this determination.<sup>26/</sup>

There is equipment used at the landfills that is owned by PSA and PSA employees go to the landfills to service that equipment. A landfill parts driver picks up parts from SMCo daily and distributes the parts to the various landfills. There may be occasions when work from the landfill would be sent to the Whittier facility. This would occur when a complete machine rebuild or power train overhaul was necessary. This happened only twice so far in 2002 and only six to seven times in 2001.

After evaluating the traditional community of interest factors, I conclude that the employees in the petitioned-for unit share a community of interest distinct from the employees at the landfills. In this regard, I particularly note that although there is interchange between the employees at the different landfill locations, there is virtually no interchange and/or contact between the landfill employees and other unit employees. I also note that there is a separate supervisor for the employees at the three landfills. In addition, there are other differences in the terms and conditions of employment for the landfill employees. Most importantly, the landfill employees, unlike the unit employees, have been found to be subject to the State of California prevailing wage laws.

I am aware that the landfill employees perform similar functions and have similar skills as other SMCo employees and that they are subject to the same centralized human resources policies. In fact, an appropriate unit could include the landfill employees. Nevertheless, since the unit employees share a community of interest distinct from the landfill employees, I do not find that the inclusion of the landfill employees in the unit is required. Therefore, I shall exclude them from the unit.

---

<sup>26/</sup> SMCo argues that since the Department of Industrial Relations has not yet enforced this determination, SMCo has not yet had an opportunity to contest the determination in a State Court.

#### **D. INTERNS**

There is an issue as to whether participants in an intern program are in the unit and eligible to vote. The Employers recently implemented an intern program called the “Think Big Program.” This is a training program to train interns to become Caterpillar technicians. There currently are four individuals in the Employers’ intern program. One of the individuals, Garet Ramos, had been a PSA employee, who transferred into SMC Co in order to participate in the program. The other three interns have not yet worked for the Employers. The program is a 2-year program, during which the interns will spend alternating 8-week periods of time in school and 8-week periods of time working with SMC Co technicians performing technician work at the SMC Co Whittier facility. The interns will be paid wages that are within the same range as other unit employees during the 8-week cycles that they are working.<sup>27/</sup> They also will be eligible after 90 days for the same benefits as other employees. During their 8-week work cycles, the interns will work the same hours as other employees and will be supervised by the same supervisors as other employees.<sup>28/</sup> The interns will receive the same orientation as other employees and will be subject to the same employment policies. It is SMC Co’s expectation that the interns will start working for SMC Co as soon as they complete the intern program. They will not have to wait for job openings.

At the time of the Hearing, the interns were in the midst of the first 8-week school cycle. They had not yet begun to work at the SMC Co facility. The parties all agree that Garet Ramos, the intern who had been working at PSA and transferred into a SMC Co position before actually starting the intern program, should be included in the unit. At the Hearing, the Employers stated that the other three interns would be in the unit once they completed their initial 8-week training and actually began to work. In their Post-Hearing

---

<sup>27/</sup> The interns are not paid during the 8-week cycles that they are in school and not working.

<sup>28/</sup> In addition to their direct supervisor, the interns will have a mentor and their work will be overseen by the Service Operations Manager.

Brief, the Employers take the position that there is insufficient information to determine if and when the interns might be included in an appropriate unit. The Petitioner agrees that Garet Ramos should be in the unit and eligible to vote and the Petitioner did not take a position as to whether the other interns should be included in the unit.

Section 2(3) of the Act broadly defines the term “employee” to include “any employee.” *New York University*, 332 NLRB No. 111 (October 31, 2000). Once the interns begin working for SMCo, performing unit work, they will be employees who share a sufficient community of interest with other employees to be included in the unit. See, *Hicks Oils & Hicksgas*, 293 NLRB 84, 107 (1989). They will be working alongside unit employees, performing the same type of work, under the same supervision. In addition they will be receiving benefits and earning pay in the same range as unit employees. Moreover, even during the periods of time that they are in their 8-week school cycles, there will be an expectation of continued employment. However, I conclude that they will not be eligible to vote unless they have begun their first 8-week cycle of work during the eligibility period. Therefore, if the interns have commenced their first 8-week cycle of work for SMCo during the payroll period ending immediately preceding the date of this Decision, and they remain in the program on the date of the election (regardless of whether they are in their 8-week school cycle or their 8-week work cycle on that date), they will be eligible to vote. Garet Ramos, who had already been employed by SMCo prior to entering the program is eligible to vote regardless of whether he has completed the first 8-week school cycle.

For the reasons set forth above, I find that the petitioned-for unit, excluding the PSA employees and excluding the SMCo employees at the landfills, is appropriate. There are approximately 213 employees in the unit.

## **DIRECTION OF ELECTION<sup>29/</sup>**

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

**ELIGIBLE TO VOTE:** Those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls.

**INELIGIBLE TO VOTE:** Employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, AFL-CIO.**

---

<sup>29/</sup> In accordance with Section 102.67 of the Board's Rules and Regulations, as amended all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employers with me within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before, **October 3, 2002**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

## **RIGHT TO REQUEST REVIEW**

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, under the provision of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by **October 10, 2002**.

**DATED** at Los Angeles, California this 26<sup>th</sup> day of September, 2002.

/s/ Byron B. Kohn  
Byron B. Kohn, Acting Regional Director  
National Labor Relations Board  
Region 31

362-6736-5000  
362-6742-6000  
440-3350-2500  
440-3375  
460-5067-1400  
460-5067-4500  
420-2900  
420-4025  
420-4083  
420-5000  
420-5034  
420-6240